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No. 79-1406

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., et al.,
Respondents.

BRIEF OF AMICUS CURIAE OF CITY OF SAN JOSE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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The City of San Jose, a municipal corporation, respectfully submits its brief, *amicus curiae,* with the consent of the parties pursuant to United States Court Rule 42, in support of the position advanced by Petitioner City of Los Angeles. Copies of the letters of consent are filed herewith.

INTRODUCTION

The City of San Jose appears as amicus curiae in support of the Petition for Writ of Certiorari by the City of Los Angeles because it too is an airport proprietor vitally interested in the resolution of the questions posed in the petition.

The San Jose Municipal Airport has had to contend with a serious noise impact on surrounding communities as the price of providing air service to those same communities. Substantial sums have already been diverted from needed airport developments in order to buy properties affected by this noise impact, and even larger expenditures for further acquisition and sound-proofing will be necessary in the future. In attempting to resolve its noise impact problem, the City of San Jose can ill afford to also burden the courts and itself in averting countless and never-ending nuisance actions.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. Preliminary Statement

Your amicus, City of San Jose, adopts by reference the brief of Petitioner City of Los Angeles in the Petition for Writ of Certiorari.

2. The Extent of Federal Preemption Is in Doubt

Federal preemption of state and local noise regulations received a broad statement by the United States Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 683 (1973):

> "Control of noise is of course deep seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfew or other local controls."

Since then, however, a three-judge panel has distinguished *Burbank* and stated a scaled-down version of fed-

eral noise preemption: state or local noise controls which do not "intrude upon or affect flight operations and airspace management in commerce" are not preempted. *Air Transport Association of America v. Crotti* 389 F.Supp. 58, 64-65 (1975).

Greater Westchester presents the first opportunity since *Burbank* was rendered to consider the question of nationwide significance: is the federal scheme of aircraft noise control so pervasive that all state and local controls (except by airport proprietors themselves) are preempted? If not, is the dividing line of preemption in this field whether non-proprietory state and local regulations "intrude upon or affect flight operations and airspace management?"

This is the fundamental decision required before one can ask whether the state nuisance law at risk in *Greater Westchester* intrudes into the federal domain. For if the holding in *Burbank* is as broad as appears, there can be no question but that the state law here is preempted. If the preemption is narrower, a new analytic tool is needed for delineating the line over which state and local controls may not go. The advent of aggressive airport regulation by states such as California and the swelling of a new (and probably nationwide) wave of airport nuisance litigation requires a clear statement of the Court's meaning in *Burbank*. The case on petition offers a well-defined framework for giving guidance in this field of great importance to the nation's airports and to the states and municipalities who would seek to regulate their noise.

3. California's Nuisance Law Intrudes on the Federally-Preempted Field of Aircraft Flight

The parties to this case correctly stipulated that "While in flight, commercial jet aircraft are subject to the control of the United States Government, not the City," and "'Flight' as used herein, means from the time an aircraft leaves the gate until it returns to the gate." It was private aircraft operating under pervasive federal government control which created the harm for which recovery was awarded; there was absolutely no showing that the City engaged in any tortious conduct on its own property or in control of these aircraft in flight.

These are circumstances unique to airports served by Federal Aviation Administration air traffic control facilities, which form an integral part of the intertstate commerce air transportation system of this country. Recent Federal and State court decisions in California acknowledged that state or local assertion of the police power over such a system is fundamentally inconsistent with the scheme of intergovernmental relations developed for that system. *Burbank v. Lockheed Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547]; *Air Transportation Association of America v. Crotti* (N.D. Cal. 1975), 389 F.Supp. 58; *San Diego Unified Port District v. Superior Court* (Britt) (1977) 67 Cal.App.3d 361. State exercise of the judicial power, asserting state jurisdiction for tort actions created by state law, is likewise inconsistent with the fact of pervasive federal control over this interstate commerce system. It is respectfully submitted that the decision in

San Diego Unified Port District v. Superior Court (1977) 67 Cal.App.3d 361,[1] was correct in its observation that:

> ". . . civil damages for the noxious byproducts of aircraft in flight, like the Burbank ordinance and like the SENEL regulations invalidated in *Crotti,* are a form of state regulation in an area which must remain free of such regulation if national air safety, traffic and noise policy are to be left unhampered."

4. Airport Proprietors Have Legal Obligations for Noise Under the Constitution and Federal Law But Not Under Interfering State Law

The California Supreme Court apparently misunderstands the holding of the United States Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624 (1973). Yes, that case reserved room for the airport proprietor within the federal scheme of national aircraft noise regulation, which imposes legal obligations on the airport proprietors in return. This constrained proprietary power has been considered sufficient to impose upon airports inverse condemnation liability for aircraft noise. *Aaron v. City of Los Angeles,* 40 Cal.App.3d 471, 115 C.R. 162 (1974). Airport proprietors also have legal obligations under the federal scheme to exercise their limited powers in a reasonable and non-discriminatory fashion. *British Airways Bd. v. Port Authority of New York, etc.* (2d Cir. 1977) 564 F.2d 1002, 558 F.2d 75. The airport proprietors' legal obligations have thus been defined by the Constitution and federal noise control regulations.

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[1]City with approval but also apparently overruled by implication in the decision for which a Writ of Certiorari is herein petitioned.

What the California Supreme Court overlooked is that to say airport proprietors have legal obligations is *not* to say the have legal obligations to the *states*. The federal scheme has clearly precluded interfering state regulation (*Air Transportation Association of America v. Crotti* (N.D. Cal. 1975) 389 F.Supp. 58) and the imposition of tort damages by states over a federally-owned field of activity is a serious form of interference. *San Diego Building Trade Council v. Garmon,* 359 U.S. 236 (1959); *Luedtke v. County of Milwaukee* (7th Cir. 1975) 521 F. 2d 387.

5. California's Nuisance Law Affects Interstate Air Commerce

If the decisions below are upheld a host of nuisance actions may be spawned against the California airports. San Jose, like most other California airports, is already experiencing this expected new wave of nuisance litigation. Despite the fact that these public airports may have already acquired avigation easements over surrounding properties by purchase or as a result of inverse condemnation actions, there would remain the prospect of innumerable and repetitive nuisance actions for damages (and perhaps the more serious threat of injunctive relief) from the owners and occupiers of these same properties. The only effective resolution would then be to acquire these properties entirely and relocate their residents.

In *Griggs v. Allegheny County* 369 U.S. 84 (1962) 7 L. Ed.2d 585, 82 S.Ct. 531) the line of inverse condemnation cases against airports for noise was begun with the observation that:

> "Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough."

Allowance of a new line of state law nuisance cases for airport noise is tantamount to saying: "By state tort law standards, the airport did not acquire enough."

This resolution of the problem, however, would impose not only a serious financial burden on the public airports of states following the lead of California but, more particularly, would create unacceptable political reactions in the communities faced with a major new eminent domain program launched against its citizens. In view of the protection afforded by constitutional standards, as well as the unwarranted intrusion into interstate air transportation that additional nuisance actions must portend, the permission of a state law cause of action in nuisance for airport noise is respectfully urged to be neither necessary nor desirable.

Dated: June 11, 1980.

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